Supreme Court, U. S.
FILED
MAR 21 1975

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1219

MODERN ASPHALT PAVING AND CONSTRUCTION CO.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Seventh Circuit

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To the United States Court of Appeals for the Seventh Circuit

Modern Asphalt Paving and Construction Co., a corporation, petitioner, prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case on January 29, 1975.

OPINION BELOW

The opinion of the United States Court of Appeals is not yet reported, but is set forth in full as Appendix "A" to this petition on Pages A-1 through A-13. The opinion of the Court of Appeals affirmed the convictions of Modern Asphalt Paving and Construction Co. and a co-defendant corporation for an

alleged violation of Section 1 of the Sherman Act (15 USCA Sec. 1). The petitioner and co-defendant had been tried by jury in the United States District Court for the Eastern District of Illinois, the Honorable James L. Foreman, Judge presiding, and the jury found both defendants guilty. The Court denied all defendants' post-trial motions, imposed monetary fines upon both defendants and entered judgment of conviction on the jury's verdict.

JURISDICTION

The judgment of the United States Court of Appeals was entered on January 29, 1975. A Petition for Rehearing was filed on February 12, 1975 and denied by the United States Court of Appeals on February 25, 1975. Jurisdiction of this Court is invoked under 28 USC, Section 1254(1).

QUESTION PRESENTED

Did the court below err in affirming the District Court's judgment of conviction of petitioner by holding that the jurisdictional and substantive requirement of Section 1 of the Sherman Act (15 USCA Sec. 1) of a "restraint of interstate commerce" by the prohibited activity was met by evidence that goods (representing less than 10% of the entire cost of a wholly intrastate local city sewer project) were purchased in interstate commerce and employed in the local construction project and some federal funds for the project came from the United States Department of Housing and Urban Development (HUD), a federal agency, in the absence of any proof of any restraining effect upon either the price or intent to affect the price of the flow of the incidentally employed interstate commodities.

STATUTES INVOLVED

The statute involved is the Sherman Antitrust Act, 15 USC, Sec. 1, et seq. The relevant provisions of 15 USCA, Sec. 1 are quoted in full as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on

conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

STATEMENT OF THE CASE

This action arose by the return of an indictment by the Grand Jury for the United States District Court for the Eastern District of Illinois which contained a single count charging Finis P. Ernest, Inc. (Ernest) and Modern Asphalt Paving and Construction Co. (Modern) with a violation of the Sherman Act, 15 USCA, Section 1, for a combination and conspiracy to submit collusive and non-competitive, rigged bids to the City of East St. Louis, Illinois for a local city sanitary sewer project.

The case was tried to a jury, the Honorable James L. Foreman, Judge presiding, and the jury found both defendants guilty. The trial court denied all of the defendants' post-trial motions and imposed fines of $35,000.00 and costs on Ernest and $15,000.00 and costs on Modern.

The petitioner, Modern, raised three issues on the appeal to the United States Court of Appeals for the Seventh Circuit:

1. Whether there was sufficient evidence to prove the jurisdictional and substantive requirements of a restraint of interstate commerce imposed by Section 1 of the Sherman Act (15 USC Sec. 1);
2. Whether the evidence was sufficient to prove a conspiracy between the defendants to rig bids; and
3. Whether the court erred in admitting evidence showing that Modern had insufficient funds in its checking account to cover the check which it submitted to the City with its bid.

The petitioner on this appeal in this petition prays certiorari solely upon the issue of whether there was sufficient evidence to prove the federal constitutional jurisdictional requirement as well as the substantive statutory requirement of Section 1 of the Sherman Act (15 USCA, Sec. 1) that an actual *restraint* on interstate commerce must be shown to establish jurisdiction under Section 1 of the Sherman Act.

Petitioner's co-defendant, Ernest, has not joined in this petition for a writ of certiorari although Ernest did, independently, appeal its conviction to the United States Court of Appeals for the Seventh Circuit.

The facts shown by the evidence insofar as they relate to the jurisdictional and substantive issue of whether or not the evidence reflected the statutory and constitutional requisite "restraint on interstate commerce" are as follows:

Ernest and Modern were the only two bidders on a local sanitary sewer project involving a few city blocks in the City of East St. Louis, Illinois which was financed, in whole or in part, by federal funds under a grant from the United States Department of Housing and Urban Development (HUD), a federal agency, in connection with a local East St. Louis urban renewal scheme.

The Ernest total bid for the project was $260,180.78. The total bid price of Modern for the same job was $262,204.65.

The alleged conspiracy involved a wholly intrastate sewer project in the City of East St. Louis, Illinois; involved only local workmen; and involved two local East St. Louis contractors (defendants Ernest and Modern), neither of whom was engaged in the production and sale of goods and services in interstate commerce. The defendants each were local contractors in the City of East St. Louis on a local sewer project and were engaged in activities solely intrastate in nature. The defendant, Ernest, was awarded the contract on his low bid. The

Government introduced evidence that materials used by Ernest in construction of these local sanitary sewers were manufactured outside the State of Illinois. Clay sewer pipe manufactured in Indiana and manhole frames and covers manufactured in Wisconsin were purchased by Ernest after the job had been awarded from Sidener Supply Company of Granite City, Illinois who sold the goods to Ernest out of stock on hand in their warehouse in Illinois. A sewer pumping station was purchased by Ernest after the award of the job from Davco Manufacturing Company in Georgia. The total cost of all items from outside the State of Illinois which were employed in the $260,180.78 project was approximately $9307.00. This represented less than 10% of the total contract price. Larry E. Sidener, the owner of Sidener Supply Company, who sold to Ernest out of his stock on hand clay pipe and manhole covers and frames, testified that prior to any bidding on this project he purchased these manhole covers and frames outside the State of Illinois and had maintained them in his warehouse stock in Granite City, Illinois for sale to Illinois customers. The Government witness, Daniel Beck of Davco Manufacturing Company, and the witness Sidener of Sidener Supply Company testified that the price they charged for the pumping station and the clay pipe and manhole covers and frames to Ernest was precisely the same price that would have been charged to any prospective customer who sought to purchase these commodities at the time. There was no evidence at all of any effect upon the price charged for the interstate goods which represented the minor fraction (less than 10%) of the $260,180.78 cost of the project and there was no evidence whatever of any agreement by Davco, Sidener, the defendants or anyone else to affect or control or restrain the prices or deliveries of any commodities in interstate commerce.

The project was built under a contract with the City of East St. Louis, Illinois with funds which had been supplied by the United States Department of Housing and Urban Development (HUD). In February of 1971 (seven months prior to the time the alleged collusive bids were submitted in August of 1971), the United States Department of Housing and Urban Development (HUD) approved $300,000.00 for public improvements, primarily sewer construction. The foregoing facts are the only facts in the case which relate or pertain in any way to the proof of the jurisdictional prerequisite of a "restraint on interstate commerce."

The issue of a lack of jurisdiction in the Federal Court and a complete failure of the evidence to show a violation of the Sherman Act by reason of the lack of any evidence to prove the requisite restraint on interstate commerce was raised by the petitioner in all stages of this proceeding. In the District Court the issue was raised in Motions for Judgment of Acquittal filed at the close of the Government's evidence and at the close of all the evidence as well as in petitioner's Motion in Arrest of Judgment, for Judgment of Acquittal and for a New Trial.

This same issue was presented to the United States Court of Appeals for the Seventh Circuit by the petitioner and this most crucial issue of the necessary "restraint on interstate commerce" was given priority treatment by the Court of Appeals in its eleven and one-half page opinion which devoted approximately nine pages thereof to a discussion of the unique and heretofore unresolved issue here presented.

The opinion of the United States Court of Appeals for the Seventh Circuit affirmed the conviction of the petitioner and held that the evidence hereinabove referred to was sufficient to satisfy the jurisdictional and substantive requirements of the Sherman Act relating to a restraint on interstate commerce.

In so holding, the Court of Appeals for the Seventh Circuit pointed out that this Court, the Supreme Court of the United States, "has never decided the question of whether a business

with out of state activities which engages in a local conspiracy to restrain commerce falls within the jurisdiction of the Sherman Act EVEN THOUGH THERE IS NO RESTRAINING EFFECT UPON INTERSTATE COMMERCE."

In addition, the Court of Appeals held for the first time in any case under the Sherman Act, that the presence of federal money in a project, however local in nature, is sufficient to establish a restraint on interstate commerce within the meaning of the Sherman Act.

REASONS FOR GRANTING THE WRIT

The petitioner, Modern Asphalt Paving and Construction Co., respectfully and most earnestly and sincerely urges that there exist in this cause not less than three manifestly, overwhelming and compelling reasons for the granting of a writ of certiorari in this cause. Those reasons are as follows:

1. This Court has never decided the question of whether a local business which only incidentally utilizes interstate goods in its business falls within the jurisdiction of the Sherman Act by engaging in a wholly local conspiracy to restrain intrastate commerce even though there is no restraining effect on interstate commerce.

2. There presently exists a division among several circuits and even conflicts within the same circuits in deciding the issue presented under No. 1 hereof.

3. Neither this Court nor any subordinate Court of Appeals or any District Court of the United States has ever held, as was done by the lower court here, that the fact that a grant of federal funds to finance, in whole or in part, a wholly local intrastate project is sufficient to satisfy the necessary jurisdictional and substantive prerequisite of the Sherman Act (15 USCA Sec. 1) of a "restraint of trade or commerce among the several states or with foreign nations."

I

This Court Has Never Decided the Question of Whether a Local Business Which Only Incidentally Utilizes Interstate Goods in Its Business Falls Within the Jurisdiction of the Sherman Act by Engaging in a Wholly Local Conspiracy to Restrain Intrastate Commerce Even Though There Is No Restraining Effect on Interstate Commerce.

The United States Court of Appeals for the Seventh Circuit in its opinion reviewed the entire evidentiary record in this cause and found that conspiracy existed between the petitioner, Modern Asphalt Paving and Construction Co., and its co-defendant, Finis P. Ernest, Inc., to submit collusive, non-competitive and rigged bids on a local sanitary sewer project in East St. Louis, Illinois. The award of the contract was made to Ernest on his low bid of $260,180.78. The Court of Appeals found that of this total cost of the project, substantially less than 10%, to-wit: $9,307.00, represented goods which had been manufactured outside the State of Illinois. The Court of Appeals found that the price of these interstate goods was not affected by the alleged bid rigging since the evidence showed that the sellers of these interstate goods charged the standard prices for the items sold. Despite the absence of any evidence in the cause of a restraint upon the flow of interstate goods or the price to be charged therefor; and despite direct and uncontradicted proof of the absence of any effect on the prices for these interstate items by the alleged bid rigging, the Court of Appeals hypothesized a theoretical restraint on interstate commerce by a misapplication of the doctrine that price fixing constitutes a *per se* restraint under the decision of this Court in *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309-310 (1956) and *United States v. Bensinger Co.*, 8 Cir., 430 F2d 584, 588 (1970).

In so doing, the opinion of the Court of Appeals for the Seventh Circuit in this case failed to recognize that Section 1 of

the Sherman Act (15 USCA, Sec. 1) prohibits conspiracies "in restraint" of interstate commerce. The statutory language and the cases which have interpreted it clearly reflect that the "restraint" may be either of the following two categories:

> A. If the object of the conspiracy directly affects the price of goods in the flow of commerce, it is said to be a per se violation and there need be no qualitative test as to whether the amount of the restraint was substantial and adversely affects interstate commerce. *Gulf Oil Corp. v. Copp Paving Co.*, . . . U.S. . . ., 42 L.Ed. 2d 378, 386, 95 S.Ct. . . .; *Page v. Work*, 290 F2d 323, 331, 332, 9th Cir. (1961); *United States v. Bensinger*, 430 F2d 584, 589, 8th Cir. (1970).
>
> B. Where the price fixing is at a purely local level or intrastate level, as in the case at bar, the assumed conspiracy does not as a matter of law affect interstate commerce. With respect to a local or intrastate activity which incidentally employs some goods which had been transported in interstate commerce, the conspiracy must be shown by the evidence to have substantially and adversely affected the flow of interstate commerce. *Gulf Oil Corp. v. Copp Paving Co.*, . . . U.S. . . ., 42 L.Ed. 2d 378, 386, 95 S.Ct. . . .; *Page v. Work*, 290 F.2d 323, 331, 332, 9th Cir. (1961); *United States v. Bensinger*, 430 F2d 584, 589, 8th Cir. (1970); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 234, 238-239 (1948); *United States v. Employing Plasterers Association*, 347 U.S. 186, 188 (1954).

The Court of Appeals for the Seventh Circuit in the case at bar (and apparently Courts in other Circuits) have mistakenly failed to recognize the distinction made by this Court in its prior decision which delineated the different standards to be applied where the conspiracy directed affected the price of goods in the flow of interstate commerce under "A" above and where the

price fixing is at a purely local or intrastate level and only incidentally employs some goods which had been manufactured in interstate commerce. This distinction, which was overlooked by the Court of Appeals for the Seventh Circuit in this case, did not escape the Court of Appeals for the Eighth Circuit in *United States v. Bensinger*, 430 F.2d 584, 589, 8th Cir. (1970). Nowhere is the fatal defect inherent in the prosecution in this case more pointedly demonstrated than in the opinion of the Eighth Circuit in *Bensinger*.

There, the conspiracy charged involved an agreement between a local St. Louis dealer of kitchen appliances and an appliance manufacturer, the defendant Hobart, in the State of Ohio, to fix the price of a single dishwasher which was to be sold to a local St. Louis Polynesian restaurant. The proof showed that Hobart and its local dealer, Bensinger, entered into a price fixing agreement for the sale of a dishwasher manufactured by Hobart in Ohio which was to be sold through Bensinger to a Polynesian restaurant in St. Louis. Another Hobert dealer, Almar, who desired to bid to supply the Hobart dishwasher was told by Hobart's sales representative that Hobart would not allow Almar to underbid Bensinger for the job. If Almar bid the job, it would not only be in danger of having its Hobart franchise revoked by Hobart; but if it underbid Bensinger and got the job, Hobart would not deliver the dishwasher to Almar.

Despite the fact that the difference in the price to be bid by Almar and Bensinger was less than $400.00, the Court of Appeals, quite correctly, affirmed the conviction of both Bensinger and Hobart. The Court held that the agreement directly threatened both the delivery and the pricing of goods produced in interstate commerce. It was, therefore, a *per se* violation of the Sherman Act and thus it was not necessary to prove a substantial effect on interstate commerce. In so holding, however, the Court of Appeals for the Eighth Circuit sharply delineated

and distinguished their holding in that case from the precise situation which we have in the case at bar. The Court of Appeals said in a footnote to their opinion at Page 589:

> "Since the conspiracy was not intrastate in character the requirement of that theory that the effect on interstate commerce be direct and substantial is not applicable here. . . . If the conspiracy were one involving only Bensinger and Almar, we would have a different case, for then there would be a more difficult question as to whether the conspiracy occurred in the course of interstate commerce; we might then be faced with the question of whether this was an intrastate conspiracy which substantially affected interstate commerce. However, the involvement of Hobart as a conspirator changes the whole complexion of the conspiracy."

In the case at bar, one need only substitute the names of Ernest and Modern for Bensinger and Almar in the above quotation to perceive the fatal defect inherent in the opinion of the Court of Appeals in petitioner's case. In the case at bar, there is not, as the Court of Appeals found, a scintilla of evidence that the alleged conspiracy between Ernest and Modern had the slightest effect upon the prices charged by Davco and Sidener for the minor amount of interstate goods employed in the project.

The Court of Appeals laboriously reviewed decisions of this Court and previous decisions in the Ninth Circuit, the Seventh Circuit, the Fifth Circuit, the Second Circuit, and the Eighth Circuit which were in some respects found to be "inconsistent" and attempted to rationalize these seemingly conflicting opinions and to evaluate the delicate factual nuances inherent in each. In its dilemma, the United States Court of Appeals in its opinion at Page 6 lamented the confusing condition of the present case law and observed at Page 6:

"The Supreme Court has never decided the question of whether a business with out-of-state activities which engages in a local conspiracy to restrain commerce falls within the jurisdiction of the Sherman Act even though there is no restraining effect on interstate commerce. In deciding related questions, however, the Court has used language which might suggest that an interstate restraint is required for jurisdiction."

We agree with the Court of Appeals for the Seventh Circuit in this cause that this Court has never decided or passed squarely upon the jurisdictional and substantive issue presented by this case. This Court is now presented by this petition with an opportunity to finally and definitively resolve this nagging issue for it is squarely presented in this case and by the grant of certiorari herein, this Court may once and for all resolve the nagging and pernicious dilemma which now exists with respect to Section 1 of the Sherman Act.

II

There Presently Exists a Division Among Several Circuits and Even Apparent Conflicts Within the Same Circuit in Deciding the Issue Presented Under "I" Hereof.

The opinion of the Court of Appeals for the Seventh Circuit in the case at bar points up the problem of interpretation which exists among several circuits as to whether the elements of restraint and interstate commerce may be satisfied separately or whether jurisdiction requires that restraint be upon the interstate commerce.

In the opinion, the prior decisions of the Ninth Circuit in *Gough v. Rossmoor Cor.*, 9 Cir., 487 F2d 373, 376 (1973); *In re Western Liquid Asphalt Cases*, 9th Cir., 487 F2d 202 (1973); *Gulf Oil Corp. v. Copp Paving Co.*, ... U.S. ..., 42

L.Ed. 2d 378, 386, 95 S.Ct. ..., 9th Cir., 487 F2d 202; *Ford Wholesale Co. v. Fibreboard Paper Products Corp.*, 9th Cir., 493 F2d 1204; *Page v. Work*, 9th Cir., 290 F2d 323 (1961); and *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 9th Cir., 420 F2d 341 (1969) were reviewed and found by the Court of Appeals for the Seventh Circuit in this case to be in some respects inconsistent. Moreover, in its opinion in the case at bar, the Court of Appeals found that the Courts in other Circuits, to-wit: the Fifth, the Second and the Eighth, had found jurisdiction under the Sherman Act to be absent where interstate activities *were alleged where there was no showing that the restraint operated on the interstate commerce*. See *Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.*, 5th Cir., 469 F2d 416 (1972); *Lieberthal v. North County Lanes, Inc.*, 2 Circuit, 332 F2d 269 (1964); *Elizabeth Hospital, Inc. v. Richardson*, 8th Cir., 269 F2d 167, cert. denied, 361 U.S. 884 (1959); *Saint Anthony-Minneapolis, Inc. v. Red Owl Stores, Inc.*, 316 F. Supp. 1045 (D.Minn. 1970).

After observing that this Court has never decided the issue, the Court of Appeals found both jurisdiction and a substantive violation of the Sherman Act despite the fact that the evidence showed that the price of the interstate goods in the case at bar was not affected by the alleged bid rigging. The Court of Appeals for the Seventh Circuit in its opinion in this case adopted a view in direct opposition and in contradiction to the rationale of the Ninth Circuit in *Page v. Work*, 290 F2d 323, 331, 332 (9th Cir., 1961); the Fifth Circuit in *Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.*, 469 F2d 416 (1972); the Second Circuit in *Lieberthal v. North County Lanes, Inc.*, 332 F2d 269 (1964); and the Eighth Circuit in *Elizabeth Hospital, Inc. v. Richardson*, 8th Cir., 269 F2d 167, cert. denied, 361 U.S. 884 (1959) and *United States v. Bensinger*, 430 F2d 584, 589 (1970).

The conflict between the circuits on the issue here presented is manifest. The absence of an earlier definitive decision on the

issue here presented by this Court has contributed to the present confusion. This conflict between the circuits and the resultant confusion inherent therein ought to be resolved by the grant of the prayer of this petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in this cause.

III

Neither This Court, Nor Any Subordinate Court of Appeals or Any District Court of the United States Has Ever Held, as Was Done by the Lower Court Here That the Fact That a Grant of Federal Funds to Finance, in Whole or in Part, a Wholly Intrastate Project Is Sufficient to Satisfy the Necessary Jurisdictional and Substantive Prerequisite of the Sherman Act (15 USCA, Sec. 1) **of a "Restraint of Trade or Commerce Among the Several States or With Foreign Nations".**

The indictment in this cause (Appendix "B") in describing the local sewer construction project contained an allegation that the Federal Government, through the United States Department of Housing and Urban Development (HUD), financed the construction of the local sanitary sewer project in East St. Louis, Illinois by the approval of $300,000.00 in federal funds for this project. There was no allegation that such funds were a part of interstate commerce or that the presence of such funds constituted the necessary jurisdictional and substantive requirements of the Sherman Act (15 USCA, Sec. 1) of a restraint on interstate commerce by reason of the effect of the alleged price fixing agreement. Section 1 of the Sherman Act does not refer in any way, either directly or indirectly, to the presence of federal money as an element in determining the jurisdictional and substantive requirements of the act with regard to a restraint on interstate commerce.

There is no decision of any court prior to the decision of the United States Court of Appeals for the Seventh Circuit in the

instant case which has held or, so far as is known, has even considered this issue. At Page 8 of the opinion of the United States Court of Appeals for the Seventh Circuit, that court held for the first time in the history of jurisprudence that because funds for the local project came from the United States Department of Housing and Urban Development (HUD), a federal agency, that those funds were transferred in interstate commerce and this fact alone was sufficient to supply not only the jurisdictional nexus of interstate commerce itself, but also the substantive requirement of Section 1 of the Sherman Act. The Court of Appeals hypothesized from a record which is completely devoid of any testimony that the United States Department of Housing and Urban Development (HUD) funds were transferred in interstate commerce or the flow of such funds were restrained in any way.

The issue thus presented is not only novel and one of first impression, but also it is one of far reaching implications. Virtually no aspect of human activity in the fifty States of this Union would be beyond the reach of the implications of Section 1 of the Sherman Act if the decision of the United States Court of Appeals for the Seventh Circuit were allowed to stand. Every physician in this country derives a portion of his income through federal money through Medicare; every pharmacist likewise receives money through the same Government Health and Welfare programs; each local groceryman who accepts food stamps would thus be subject to the Sherman Act; every local service station which sells motor fuel on which there is a motor fuel tax imposed would be within the reach of the Act, however isolated, local and whatever the minor nature of his business activities. No political subdivision of State Government, nor even the State itself, from every local volunteer fire department through each school district, township, city, county and state where any quantity of federal funds by way of excise taxes, revenue sharing, housing and urban development program, school aid or Medicare. No human

activity in our society would be beyond the reach of the Sherman Act if the novel and unprecedented hypothesis set forth in the opinion of the United States Court of Appeals for the Seventh Circuit were allowed to stand. To say that this theory is revolutionary and the implications of it unprecedented is conservative indeed. Neither the legislative history of the act itself nor any decision by this or any other Court which has construed it has ever, by even the slightest hint, suggested that Section 1 of the Sherman Act was intended to have such broad or far reaching implications. It is significant that neither the United States Court of Appeals nor the Federal Government in its Brief filed before that Court cited any legislative or judicial authority in support of its position on this issue.

Almost one-half a century ago, this Court in its infinite wisdom and with an abundance of foresight, cautioned the courts of this nation to be wary of progressive and pernicious extensions of jurisdiction invoked under the Sherman Act by carefully and assiduously considering each case upon the particular facts disclosed by the record. In *Maple Flooring Manufacturers' Assn., et al. v. United States*, 268 US 563, 579 (1925), 69 L.Ed. 1100, this court was called upon to consider whether the conduct of the defendant caused direct and undue restraint of competition in interstate commerce. With regard to consideration of that issue, the Court cautioned at Page 579 of 268 US:

> "It should be said at the outset that in considering the application of the rule of decision in these cases to the situation presented by this record, it should be remembered that this court has often announced that each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and that the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied."

CONCLUSION

Certiorari is warranted here. The opinion of the United States Court of Appeals for the Seventh Circuit virtually invites this Court to grant certiorari. Each of the elements which this court has traditionally found to warrant the grant of certiorari is present here:

A. The jurisdictional issue under a law of the United States, to wit: the Sherman Act (15 USCA, Sec. 1) is involved;

B. This court has never decided the issue presented in this cause;

C. There presently exists a division among several circuits and even apparent conflicts within the same circuit concerning the issue; and

D. The holding of the Court of Appeals that the presence of federal funds in a project or activity is sufficient to comply with the jurisdictional and substantive requirements of the Sherman Act is novel, without precedence, either legislative or judicial, and has such far reaching implications that the issue ought to be decided clearly and unequivocally by no less authority than this Court.

The errors of the Court below should not be permitted to stand.

Respectfully submitted

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APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 74-1276 and 74-1277

United States of America,
Plaintiff-Appellee,

v.

Finis P. Ernest, Inc. and Modern Asphalt Paving and Construction Co.,
Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of Illinois—No. Cr. 73 66 E
James L. Foreman, Judge

Argued November 8, 1974—Decided January 29, 1975

Before MARIS* and HASTINGS, *Senior Circuit Judges*, and TONE, Circuit Judge.

HASTINGS, *Senior Circuit Judge*. Defendants Finis P. Ernest, Inc. (Ernest) and Modern Asphalt Paving and Construction

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* Senior United States Circuit Judge Albert Branson Maris of the Third Circuit is sitting by designation.

Co. (Modern) were indicted under a single count indictment for violation of the Sherman Act, 15 U.S.C. § 1, for a combination and conspiracy to submit collusive, non-competitive and rigged bids to the City of East St. Louis, Illinois, for a city sanitary sewer project. The case was tried to a jury, the Honorable James L. Foreman, Judge, presiding, and the jury found both defendants guilty. The court denied all of defendants' post-trial motions and imposed fines of $35,000 and costs on Ernest and $15,000 and costs on Modern.

Defendants raise three issues in this appeal:

(1) Whether there was sufficient evidence to prove the jurisdictional requirement of a restraint of interstate commerce;

(2) Whether the evidence was sufficient to prove a conspiracy between the defendants to rig bids; and

(3) Whether the court erred in admitting evidence showing that Modern had insufficient funds in its checking account to cover the check which it submitted to the city with its bid.

Jurisdiction

The Sherman Act, 15 U.S.C. § 1, states: "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . ." The Supreme Court has recently reiterated that jurisdictional inquiry under this general language requires a particularized judicial determination which must turn on the circumstances presented in each case. *Gulf Oil Corp. v. Copp Paving Co.*, . . . U.S. . . ., 43 U.S.L.W. 4059, 4062 fn. 12 (Dec. 17, 1974). See also *Rasmussen v. American Dairy Association*, 9 Cir., 472 F.2d 517, 526-527 (1972), *cert. denied*, 412 U.S. 950 (1973).

In the instant case, the government introduced evidence that materials used by Ernest in construction of the sanitary sewers were manufactured outside the State of Illinois. Clay sewer pipe manufactured in Indiana and manhole frames and covers manufactured in Wisconsin were purchased from Sidener Supply Company in Illinois. A sewer pumping station was purchased from Davco Manufacturing Company in Georgia. The cost of these items was approximately $9,307. The project was built under contract with the City of East St. Louis with funds supplied by the United States Department of Housing and Urban Development (HUD). In February, 1971 HUD approved $300,000 for public improvements, primarily sewer construction. In October 1971, after the city had had to reject bids for sanitary and storm sewer construction because they substantially exceeded the engineer's estimate, the city requested an additional $300,000 for these projects and the increase was approved by HUD in February 1972. The question is whether these facts and the inferences which may be drawn therefrom satisfy the jurisdictional requirement of the Sherman Act.

In determining whether particular circumstances constitute a "restraint of trade or commerce among the several states" courts have taken differing approaches. See, for example, Eiger, *The Commerce Element in Federal Antitrust Litigation*, 25 Fed.B.J. 282 (1965); Note, *Portrait of the Sherman Act as a Commerce Clause Statute*, 49 N.Y.U.L.Rev. 323 (1974). Problems of interpretation seem to be due in large part to the fact that the "single cryptic phrase defines both the conduct prohibited by the Act and the statute's jurisdictional reach." *Rasmussen v. American Dairy Association*, 9 Cir., 472 F.2d 517, 521 (1972), *cert. denied*, 412 U.S. 950 (1973).

Our problem of interpretation is whether the elements of restraint and interstate commerce may be satisfied separately or whether jurisdiction requires that the restraint be upon the interstate commerce. In several recent cases the Court of Appeals

for the Ninth Circuit has viewed the question of jurisdiction under the Sherman Act as entirely one of constitutional power: whether defendants' conduct had a sufficient relationship to interstate commerce to be subject to regulation by Congress. *Gough v. Rossmoor Corp.*, 9 Cir., 487 F.2d 373, 376 (1973); *In re Western Liquid Asphalt Cases*, 9 Cir., 487 F.2d 202 (1973), *rev'd in part sub. nom. Gulf Oil Corp. v. Copp Paving Co.*, ... U.S. ..., 43 U.S.L.W. 4059 (Dec. 17, 1974). *See also Ford Wholesale Co. v. Fibreboard Paper Products Corp.*, 9 Cir., 493 F.2d 1204, *cert. denied*, ... U.S. ..., 43 U.S.L.W. 3212 (1974).[1]

The analysis of *In re Western Liquid Asphalt Cases* is illustrative of this approach. The Ninth Circuit's decision there on the issue of Sherman Act jurisdiction was unaffected by the Supreme Court's decision in the case reported as *Gulf Oil Corp. v. Copp Paving Co.*, ... U.S. ..., 43 U.S.L.W. 4059 (Dec. 17, 1974), since the Court had limited its grant of certiorari to the questions of jurisdiction under the Clayton and Robinson-Patman Acts.[2] In that case the dispute concerned asphaltic concrete which was produced in California and delivered to construction sites in California only. The Court of Appeals held that jurisdiction under the Sherman Act was satisfied because the "production of asphalt for use in interstate highways rendered the producers 'instrumentalities' of interstate commerce and placed them 'in' that commerce as a matter of law." 487 F.2d at 204. The court's bifurcated analysis made it unnecessary in deciding the question of jurisdiction to consider whether any interstate commerce was allegedly restrained. This approach,

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[1] See the discussion of Sherman Act jurisdiction in *A. Cherney Disposal Co. v. Chicago & Suburban Refuse Disposal Assn.*, 7 Cir., 484 F.2d 751, 755-759 (1973), *cert. denied*, 414 U.S. 1131 (1974).

[2] But see the comment of Mr. Justice Douglas that the Court's holding might result in a different determination of the Sherman Act question on remand. 43 U.S.L.W. at 4066 n.6 (Douglas, J., dissenting).

which widens the reach of the Act, finds some support in decisions of the Supreme Court which emphasize that Congress in the Sherman Act intended to exercise the full extent of its constitutional authority under the Commerce Clause. *See, e.g., Gulf Oil Corp., supra* 43 U.S.L.W. at 4062; *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 298 (1945); *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 557-559 (1944); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940).

In situations such as the instant case, which involve *per se* violations of the Act, there is an additional reason for not requiring proof of an adverse impact on interstate commerce to satisfy the jurisdictional requirement. A *per se* violation is activity, such as price fixing, for which effects need not be shown to establish the substantive offense. Restraints in this category "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958). Where activity falls within one of these classes of restraints it is "not for the courts to decide whether in an individual case injury had actually occurred" in determining whether there has been a substantive violation of the Act. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959). It may be anomalous to require proof of effects to satisfy jurisdiction in those cases where proof of effects is not necessary to establish the substantive offense. See *P. Areeda, Antitrust Analysis* § 178 (1967).

The alternative approach to Sherman Act jurisdiction which considers the nexus between restraint and interstate commerce is supported by other circuits decisions of the Ninth Circuit, decisions in other circuits, as well as by other language of the Supreme Court.

The jurisdictional analysis in *Page v. Work*, 9 Cir., 290 F.2d 323 (1961), seems inconsistent with the Ninth Circuit's most recent decisions, yet *Page* continues to be cited with approval in those cases. In *Page*, the complaint alleged that the defendants eliminated competition in legal advertising in Los Angeles County. The court noted that the defendant newspapers bought newsprint from outside the state, carried some national news and advertising and had some out-of-state subscribers. The court nevertheless concluded that since the claimed restraints were "on a purely local level and were wholly directed to [the] local intrastate market," 290 F.2d at 330, the jurisdictional requirement of the Sherman Act was not satisfied. The court said, "The test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business." 290 F.2d at 330. In distinguishing a group of other newspaper cases the court said further, "[i]n all the above cases a restraint of interstate commerce was found which was determinative of federal jurisdiction." 290 F.2d at 331. There is no question in *Page* that the locus of the restraint was a consideration in determining jurisdiction. *See also, Sun Valley Disposal Co. v. Silver State Disposal Co.*, 9 Cir., 420 F.2d 341 (1969).

Other courts have also found jurisdiction absent where interstate activities were alleged where there was no showing that the restraint operated on the interstate commerce. *Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.*, 5 Cir., 469 F.2d 416 (1972); *Lieberthal v. North County Lanes, Inc.*, 2 Cir., 332 F.2d 269 (1964); *Elizabeth Hospital, Inc. v. Richardson*, 8 Cir., 269 F.2d 167, *cert. denied*, 361 U.S. 884 (1959); *Saint Anthony-Minneapolis, Inc. v. Red Owl Stores, Inc.*, 316 F. Supp. 1045 (D. Minn. 1970).

The Supreme Court has never decided the question of whether a business with out-of-state activities which engages in a local conspiracy to restrain commerce falls within the jurisdiction of

the Sherman Act even though there is no restraining effect on interstate commerce. In deciding related questions, however, the Court has used language which might suggest that an interstate restraint is required for jurisdiction.

In a landmark case holding that a locally applied restraint came within the purview of the Act if the result was to restrain interstate commerce, the court stated the jurisdictional issue like this: "We first should be satisfied that the activities on which restraints are alleged to have been exerted constitute commerce among the states." *United States v. Women's Sportswear Manufacturers Association*, 336 U.S. 460, 461 (1949). The Court went on to explain that whether defendants were engaged in interstate commerce was not determinative.

> The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze. 336 U.S. at 464.

In its recent decision in *Gulf Oil Corp., supra*, the Supreme Court quoted this language from *Women's Sportswear* and briefly reviewed, in dicta, the jurisdictional requirement of Section 1 of the Sherman Act. The Court said, "The jurisdictional reach of § 1 thus is keyed directly to effects on interstate markets and the interstate flow of goods." 43 U.S.L.W. at 4062. After noting that Section 1 was designed to utilize the full extent of the constitutional power under the commerce clause, the Court went on to state that a local contract, combination or conspiracy "may constitute a restraint within the meaning of § 1 if it substantially and adversely affects interstate commerce." *Id.*

The possibility that an adverse effect upon interstate commerce is a jurisdictional requirement is also suggested by lan-

guage in earlier decisions of the Court. *See, e.g., United States v. Employing Plasterers Association*, 347 U.S. 186, 188 (1954); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 234, 238-239 (1948).

Thus, there is substantial support for both responses to the question of whether Sherman Act jurisdiction requires proof of a restraint on interstate commerce. We need not resolve that issue here, however, because we are convinced that there is sufficient evidence in this case to support a finding of jurisdiction under either approach.

Under the first approach we need only find that the restraint is sufficiently related to commerce that Congress has jurisdiction to act. Here, alleged bid rigging enabled Ernest to obtain the city sewer contract and in performing that contract it used approximately $9,307 worth of materials obtained in interstate commerce. This relationship is sufficient to assure that application of the Sherman Act to this case is not beyond the constitutional authority of Congress. Where a *per se* restraint is involved, the quantity of interstate commerce is unimportant. *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309-310 (1956); *United States v. Bensinger Co.*, 8 Cir., 430 F.2d 584, 588 (1970).

If, however, proof of a restraint of interstate commerce is required for jurisdictional purposes, there are sufficient facts to warrant such a finding. Although there was evidence that the price of $9,307 worth of materials was not affected by the alleged bid rigging since the sellers charged their standard prices for the items sold, there is still evidence to support inferences that the defendants' activity had a restraining effect upon interstate commerce.

The restraint potentially reduced competition in materials in interstate commerce. If there had been genuine competitive bidding, each contractor, in an effort to make the lowest bid,

would have obtained competitive prices from materials suppliers. The effect of the restraint was that neither Ernest nor Modern had any incentive to obtain competitive prices from out-of-state suppliers.

Further, where bids are rigged, the price the city will have to pay for the project is artificially increased. The disparity between the bids and the city engineer's lower estimate of the cost of the project is some evidence that the effect of the defendants' activity was to increase the city's cost for the project. Increasing the city's cost restrains interstate commerce in at least two ways. First, funds for the project came from HUD and its appropriation to the city had to be increased after the bid, higher than the engineer's estimate, was received. HUD funds are transferred in interstate commerce. An increase in the amount of money required for this project would inevitably mean that there would be less money available for HUD projects elsewhere in the United States. Second, where the city must use more of its available funds to complete the sewer project it will have less money to expend for other projects requiring use of goods shipped in interstate commerce.

We therefore hold that there was sufficient evidence introduced at trial to satisfy the jurisdictional requirement of the Sherman Act.

Sufficiency of the Evidence

Appellants argue that the evidence at trial was insufficient to prove that defendants conspired to rig bids for the city sewer construction project. It is not for an appellate court to weigh the evidence or determine the credibility of witnesses. "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. . . . Participation in a criminal conspiracy need not

be proved by direct evidence: a common purpose and plan may be inferred from a 'development and a collocation of circumstances.'" *Glasser v. United States*, 315 U.S. 60, 80 (1942). Where the evidence is circumstantial it is not necessary that it be such as to exclude every reasonable hypothesis other than that of guilt. As with direct evidence, it is only necessary that the jury be convinced of guilt beyond a reasonable doubt. *Holland v. United States*, 348 U.S. 121, 139-140 (1954).[3]

Our review of the evidence in the light most favorable to the government indicates that it was sufficient to prove that the defendants conspired to submit collusive bids to the City of East St. Louis.

Bids for the sanitary sewer project were first let on January 30, 1971. Ernest's bid was rejected because it was the only bid submitted for that project and because it substantially exceeded the city engineer's estimate for the cost of the job.

The sanitary sewer job was put up for rebidding on August 6, 1971. This time, only Ernest and Modern submitted bids. Ernest was awarded the contract. The bids were submitted in the form prescribed by the city which called for the listing of sixteen unit prices. Each unit price was to include all labor, materials, overhead, profit, insurance and all other costs required to cover the finished work. Although materials costs might sometimes be standardized, there were no standard prices for unit prices such as these including so many uncertain variables. Nevertheless, in the bid submitted by Modern seven of the sixteen unit prices were identical to those in the Ernest bid. For each of the other nine unit prices, the bid submitted by Modern

[3] *Cf. United States v. McCarthy*, 7 Cir., 196 F.2d 616, 619 (1952), decided by our court prior to the decision in *Holland*. While other courts of appeals have since rejected, in light of *Holland*, the rule of circumstantial evidence followed in *McCarthy*, our court has not previously had occasion to reconsider the issue. See *United States v. Currier*, 1 Cir., 454 F.2d 835, 838, 838 n.6 (1972).

was slightly higher than Ernest's bid. The differences in the prices on those items suggest that unit prices of the Modern bid had been arrived at by making simple changes in the unit prices from the Ernest bid. For example, Ernest's unit price for the first item, laying eight inch sewer pipe at depths of from six to nine feet, was $12.19, while Modern's bid was $13.19. Modern's bids on seven of the unit prices could have been the result of merely rounding off Ernest's bids for those items. For example, Ernest's bid for item three was $33.42 and Modern's was $33.50. The pumping station price on the Modern bid had been altered on the form from $49,050 to $50,550 so as to suggest that it had been deliberately changed to be higher than the Ernest price of $49,750.

There was other evidence that the Modern bid was not a serious one and was submitted so that there would be an appearance of competitive bidding. Modern's bid had been prepared on the morning the bids were due by one of its employees working at home without anyone's assistance. No one from Modern inspected the work site or contacted any suppliers.

There were also indications that Modern did not believe it could get the sewer job. It had submitted bids on other contracts which, when combined with this contract, would have committed Modern to construction jobs beyond the amount for which it could obtain a performance bond. Further, it did not appear that Modern expected the city to cash its check submitted with its bid because its checking account did not contain sufficient funds to cover the check.[4]

The government also showed that the two companies would have had an opportunity to agree upon a collusive bid because

[4] Although appellants claim that it was error to admit evidence concerning the checking account, as we discuss *infra*, we find the evidence was properly admitted.

during the summer when the bids were submitted they were working together on a driveway project.

We find that there was substantial evidence to support the jury's verdict.

Admission of Evidence

Finally, appellants argue that it was error to admit testimony of a bank cashier and Modern's bank statements indicating that there were insufficient funds in its checking account to cover the full amount of Modern's bid check. Appellants object to the evidence as irrelevant, improper rebuttal testimony, and impeachment on a collateral matter. The trial court held the evidence admissible and relevant to the question of the seriousness of Modern's bid. We agree.

Appellants contend that the evidence was in the nature of impeachment and collateral to any issue in the case. Impeachment is an attack upon the credibility of a witness. A witness' testimony may be contradicted without being impeached. *United States v. Williamson*, 5 Cir., 424 F.2d 353, 355 (1970). Here, the evidence was admissible for a purpose other than impeachment. Modern had introduced evidence to attempt to establish that its bid for the sewer job was a serious one despite the fact that it had not submitted a certified check as required by the bid specifications. The government in rebuttal introduced the evidence of insufficient funds in an attempt to demonstrate that the check was not indicative of a serious bid. The function of rebuttal is to explain, repel, counteract or disprove the evidence of the adverse party. *United States v. Mallis*, 3 Cir., 467 F.2d 567, 569 (1972); *United States v. Crowe*, 7 Cir., 188 F.2d 209, 213 (1951). There was no abuse of discretion in admitting the evidence in rebuttal.

The convictions appealed from are, in all respects, affirmed.

Affirmed

A true Copy:

Teste:

. . . . . .

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

In the United States District Court
For the Eastern District of Illinois

United States of America,

v.

Finnis P. Ernest, Inc.; and Modern Asphalt Paving and Construction Co.,

Defendants.

Criminal Action No. 73-66-E

Filed: .....

INDICTMENT

The Grand Jury charges:

I

The Defendants

1. The corporations named below are hereby indicted and made defendants herein. Each of said corporations is organized and exists under the laws of the state indicated and has its principal place of business in the city indicated. Within the period of time covered by this indictment, these defendants have engaged in the business of construction in the City of East St. Louis, Illinois.

Corporation	State of Incorporation	Principal Place of Business
Finis P. Ernest, Inc.	Delaware	East St. Louis, Illinois
Modern Asphalt Paving and Construction Co.	Delaware	East St. Louis, Illinois

II

Co-Conspirators

2. Various persons not made defendants in this indictment have participated as co-conspirators in the offense hereinafter charged and have performed acts and made statements in furtherance thereof.

III

Definitions

3. As used herein:

(a) "Sanitary sewers construction" means the installation of sewer pipe, sewage pumping stations, manhole frames, manhole covers, joints, valves and other related material necessary for the transmission of domestic wastes, sewage, waste water and other effluents.

(b) "Urban renewal area" means a slum area, a blighted deteriorated area which the Secretary of the United States Department of Housing and Urban Development has approved as appropriate for an urban renewal project.

(c) "Urban renewal project" means the undertakings and activities of a local urban renewal agency within an urban renewal area for the elimination of the development or spread of slums and blight.

(d) "Project improvements" means the installation and construction of public improvements as part of an urban renewal project within an urban renewal area which are necessary for carrying out the objectives of the urban renewal.

IV

Trade and Commerce

4. In 1959, the Federal Government awarded approximately $1.7 million to the City of East St. Louis, Illinois to finance an urban renewal project within an urban renewal area. This urban renewal project included survey and planning, land acquisition, demolition and site clearance, relocation, project improvements and other activities necessary to develop the urban renewal area.

5. In February 1971, the United States Department of Housing and Urban Development (hereinafter referred to as "HUD") approved $300,000 for the project improvements portion of this urban renewal project. These project improvements consisted primarily of excavation, street and storm sewers construction and sanitary sewers construction.

6. In June 1971, the City of East St. Louis advertised and received bids for these project improvements, including a separate bid for sanitary sewers construction. In June 1971, the City of East St. Louis rejected the bids tendered for these project improvements and re-advertised a second bid invitation for the project improvements. On August 6, 1971, the City of East St. Louis again received bids for these project improvements, including separate bids from the corporate defendants for the sanitary sewers construction. Shortly thereafter in August 1971, the City of East St. Louis awarded the sanitary sewers construction job to the defendant Finis P. Ernest, Inc., on the basis of its low bid.

7. In October 1971, the City of East St. Louis requested an additional $300,000 grant from HUD for said project improvements. In February 1972, HUD approved the City of East St. Louis' request for the $300,000 increase for project improvements.

8. Sanitary sewers construction requires, among other things, the following materials: sewer pipe, manhole frames, manhole covers, and a sewage pumping station. Sewer pipe, sewage pumping stations, manhole frames, manhole covers, and other materials are produced in and/or distributed from states other than Illinois and shipped into the State of Illinois for use in sanitary sewers construction, including such construction performed pursuant to urban renewal project improvement contracts of the City of East St. Louis.

V

Offense Charged

9. Beginning sometime prior thereto, the exact date being unknown to the grand jurors, and continuing thereafter up to at least August 6, 1971, the defendants and co-conspirators have entered into and engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in sanitary sewers construction, in violation of Section 1 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. § 1), commonly known as the Sherman Act.

10. The aforesaid combination and conspiracy consisted of an agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which were to submit collusive, non-competitive and rigged bids and price quotations to the City of East St. Louis on August 6, 1971, for sanitary sewers construction in connection with urban renewal project improvements.

11. In furtherance of the aforesaid combination and conspiracy, the defendants and co-conspirators by agreement, understanding, and concert of action did the things which, as hereinbefore charged, they combined and conspired to do.

VI

Effects

12. The combination and conspiracy had the effect of:

(a) Fixing, at an artificially high and non-competitive level, the price of sanitary sewers construction in connection with the urban renewal project improvements contract awarded by the City of East St. Louis in August 1971.

(b) Suppressing and restraining competition in urban renewal sanitary sewers construction in the City of East St. Louis.

(c) Denying the City of East St. Louis the right to receive competitive sealed bids, in free and open competition, for sanitary sewers construction in connection with its urban renewal project improvements.

VII

Jurisdiction and Venue

13. The aforesaid offense was carried out in part within the Eastern District of Illinois within five years preceding the return of this indictment.

MICHAEL L. LEVINSON
Assistant United States Attorney

A True Bill

s JOE D. TURNER
Foreman

s THOMAS E. KAUPER
Assistant Attorney General

s BUDDIA J. RASHID

s ROBERT B. HUMMEL
Attorneys, Department of Justice

HENRY A. SCHWARZ
United States Attorney

APPENDIX C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

February 25, 1975

Before
Hon. John S. Hastings, Sr. Circuit Judge
Hon. Albert B. Maris, Sr. Circuit Judge
Hon. Philip W. Tone, Circuit Judge

Nos. 74-1276, 74-1277.

United States of America, Plaintiff-Appellee, vs. Modern Asphalt Paving and Construction Company, Finis P. Ernest, Inc., Defendants-Appellants.	Appeal from the United States District Court for the Eastern District of Illinois, East St. Louis Division. (73 66 E)

On consideration of the petition for rehearing filed in the above-entitled cause,

It Is Hereby Ordered that the petition for rehearing in the above-entitled appeal be, and the same is hereby, Denied.

Petition for Rehearing Denied February 25, 1975.

Supreme Court, U. S.
FILED
JUN 13 1975

No. 74-1219

In the Supreme Court of the United States

OCTOBER TERM, 1974

MODERN ASPHALT PAVING AND CONSTRUCTION CO.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1219

MODERN ASPHALT PAVING AND CONSTRUCTION CO.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the price-fixing conspiracy of which it was convicted did not sufficiently affect interstate commerce to constitute a violation of Section 1 of the Sherman Act.

Petitioner and a co-defendant, Finis P. Ernest, Inc. (Ernest),[1] were found guilty by a jury on a one-count indictment alleging a combination and conspiracy to submit collusive bids to the City of East St. Louis, Illinois, for the construction of a sanitary sewer project. The court fined Ernest $35,000 and petitioner $15,000. The court of appeals affirmed, rejecting, among other arguments, the claim that the evidence at trial was insufficient to establish jurisdiction under the Sherman Act (Pet. App. A-1 to A-13).

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[1]Ernest is not a participant in this petition.

The evidence showed that in August 1971, two months after the city had rejected a bid from Ernest—the sole bid—as too far above the engineer's estimate, petitioner and Ernest submitted virtually identical bids on a sewer project to be financed with funds provided by the United States Department of Housing and Urban Development ("HUD"). In October 1971 the city requested an additional $300,000 from HUD for the project; in February 1972 the request was granted (Pet. App. A-3). Ernest's successful bid was $260,180.78 (Pet. 5).

Materials manufactured outside the State of Illinois were used in construction of the project. Clay sewer pipe made in Indiana and manhole frames and covers made in Wisconsin were purchased from an Illinois company. A sewer pumping station was purchased from a Georgia manufacturer. The cost of the materials purchased from outside of Illinois was $9,307 (Pet. App. A-3).

In affirming the convictions the court of appeals discussed what it considered to be two different approaches taken by the courts in "determining whether particular circumstances constitute a 'restraint of trade or commerce among the several states'" (*ibid.*). One approach, said the court, allowed the elements of "restraint" and "interstate commerce" to be satisfied separately (*id.* at A-3 to A-5). The other, said the court, "considers the nexus between restraint and interstate commerce * * *" (*id.* at A-5).

The court found it unnecessary to choose between the two approaches it perceived, however, since the evidence was sufficient "to support a finding of jurisdiction under either" (*id.* at A-8).

Petitioner urges that certiorari be granted because this Court has never decided, and the courts of appeals are in conflict over, the question whether jurisdiction under

the Sherman Act extends to "a wholly local conspiracy to restrain intrastate commerce even though there is no restraining effect on interstate commerce" (Pet. 9). This question was not decided below, however, because the court of appeals concluded that petitioner's conduct did indeed restrain interstate commerce. Furthermore, no conflict among the circuits exists since none of the decisions cited by petitioner or the court of appeals below sustained jurisdiction when the defendant's conduct had "no restraining effect on interstate commerce."

The only issue actually presented, therefore, is whether the evidence was sufficient to show a restraint of interstate commerce. The court of appeals correctly held that it was and further review of this evidentiary question is unwarranted.

1. The court of appeals did not, as petitioner suggests (*id.* at 11, 13), affirm petitioner's conviction although finding "no restraining effect on interstate commerce" (*id.* at 9). On the contrary, it specifically stated that "If * * * proof of a restraint of interstate commerce is required for jurisdictional purposes, there are sufficient facts to warrant such a finding" (Pet. App. A-8).

2. There is no conflict between the decision below and any of the decisions discussed therein or cited by petitioner. After discussing what it considered to be two different "responses to the question of whether Sherman Act jurisdiction requires proof of a restraint on interstate commerce" (*ibid.*), the court of appeals said that it need not choose between the approaches it perceived because it was "convinced that there is sufficient evidence in this case to support a finding of jurisdiction under either approach" (*ibid.*). Petitioner is thus incorrect in asserting that the court below "adopted a view in direct opposition and in contradiction to" the Ninth, Fifth, Second, and Eighth

Circuits (Pet. 15). As petitioner notes, in those cases "there was no showing that the restraint operated on the interstate commerce" (*ibid.*; emphasis deleted); here, to the contrary, the court specifically held that petitioner's anticompetitive activity did operate on interstate commerce.

Furthermore, all of the decisions cited by the court below or by petitioner can be reconciled: each inquires into the effect of the local anticompetitive conduct on interstate commerce, and none finds a violation of the Sherman Act where the local conduct had no impact on interstate commerce.[2]

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[2]In *Page* v. *Work*, 290 F.2d 323, 332 (C.A. 9), *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F.2d 341, 343 (C.A. 9), *Rosemound Sand & Gravel Co.* v. *Lambert Sand & Gravel Co.*, 469 F.2d 416, 418 (C.A. 5), *Lieberthal* v. *North Country Lanes, Inc.*, 332 F.2d 269, 272 (C.A. 2), *Elizabeth Hospital, Inc.* v. *Richardson*, 269 F.2d 167, 170 (C.A. 8), and *Saint Anthony-Minneapolis, Inc.* v. *Red Owl Stores, Inc.*, 316 F. Supp. 1045, 1048 (D. Minn.), the courts said that the test was whether the effect of local anticompetitive conduct on interstate commerce was "direct and substantial" (sometimes phrased simply "substantial"). In each case judgment was for the defendant because the effect of the local conduct on interstate commerce was nonexistent or insubstantial.

The other cases cited by the court of appeals and petitioner are consistent. In *Rasmussen* v. *American Dairy Ass'n*, 472 F.2d 517, 526-528, *Gough* v. *Rossmoor Corp.*, 487 F.2d 373, 376, and *Ford Wholesale Co., Inc.* v. *Fibreboard Paper Products Corp.*, 493 F.2d 1204, 1205, the Ninth Circuit cited *Page, supra*, for the test stated above. In *Rasmussen* and *Gough* the defendants' local anticompetitive conduct was found to have had a substantial effect on interstate commerce; in *Ford* it was not. The rationale behind each decision was the same as in the cases above. In *In re Western Liquid Asphalt Cases*, 487 F.2d 202 (C.A. 9), reversed on other grounds *sub nom. Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, the court found that the defendants' close relationship with an instrumentality of interstate commerce served to place their activities "in" commerce; that is, their activities were an integral part of interstate commerce, and there was thus no need to consider the impact of intrastate conduct.

Similarly, *United States* v. *Bensinger Co.*, 430 F.2d 584 (C.A. 8), involved an interstate, not an intrastate, conspiracy.

3. The court of appeals correctly ruled that there was sufficient evidence that petitioner's anticompetitive conduct had an impact on interstate commerce to sustain jurisdiction under the Act.

Bid-rigging conspiracies inevitably eliminate or reduce competition among the participants. "When competition is reduced, prices increase and unit sales decrease." *Burke* v. *Ford*, 389 U.S. 320, 322. Here the court of appeals ruled that, notwithstanding that the suppliers charged their standard prices for the out-of-state materials, defendants' bid-rigging eliminated the incentive to obtain competitive prices from other out-of-state materials suppliers and thereby restrained interstate commerce in clay sewer pipe, manhole frames and covers, and a sewer pumping station.[3]

The court also noted evidence that the defendants' bid-rigging increased the cost of the sewer project to the city. As the court then pointed out, "[W]here the city must use more of its available funds to complete the sewer project it will have less money to expend for other projects requiring the use of goods shipped in interstate commerce" (Pet. App. A-9). Thus in this respect also petitioner's conduct adversely affected interstate commerce. See *Burke* v. *Ford, supra*; *Addyston Pipe and Steel Co.* v. *United States*, 175 U.S. 211, 241-246.

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[3]Petitioner contends (Pet. 13) that there is not "a scintilla of evidence" that the bid-rigging "had the slightest effect upon the prices charged" by the suppliers of interstate goods employed in the project. The impact on interstate commerce is measured not by the conspiracy's effect on the price of material charged by out-of-state suppliers, however, but by the effect on the price of this material in its interstate flow from manufacturer to the ultimate consumer—the City of East St. Louis. See *Northern California Pharmaceutical Ass'n* v. *United States*, 306 F.2d 379, 386-387 (C.A. 9), certiorari denied, 371 U.S. 862.

The court also ruled that the increased cost of the project to the city resulted in an increased draw on HUD funds, which move in interstate commerce, which in turn resulted in a diminution of federal money available for projects elsewhere in the country. Anticompetitive conduct interfering with the flow of these funds can be reached by the prohibitions of the Sherman Act, for there Congress "wanted to go to the utmost extent of its Constitutional power," *United States* v. *Southeastern Underwriters Ass'n*, 322 U.S. 533, 558, and "exercised all the power it possessed." *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 495. Similarly, although the amount of money involved in the purchase of the out-of-state materials was not large, it was enough to bring the conspiracy under the Act. Cf. *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178, where this Court applied the Fair Labor Standards Act, a statute in which Congress did not exercise fully its power over commerce, *Kirschbaum Co.* v. *Walling*, 316 U.S. 517, to a newspaper only ½ of 1 percent of whose circulation was out of state.

In sum, the court of appeals correctly held that petitioner's bid-rigging had a sufficient impact on interstate commerce to violate the Sherman Act.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.